2002

State of Utah v. Richard Dale Houston : Brief of Appellant

Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

THE STATE OF UTAH,	:	
Plaintiff/Appellee,	:	
v.	:	
RICHARD DALE HOUSTON,	:	Case No. 20020526-CA
Defendant/Appellant.	:	

BRIEF OF APPELLANT

This is an appeal from a conviction for Aggravated Robbery, a first degree felony, in violation of Utah Code Ann. § 76-6-302 (1999), in the Third Judicial District Court, State of Utah, the Honorable Ann. M. Boyden, Judge, presiding.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CONSTITUTIONAL PROVISION

FEDERAL CASES

STATE CONSTITUTIONAL PROVISION

STATE STATUTES

STATE CASES

TREATISES AND OTHER AUTHORITIES

IN THE UTAH COURT OF APPEALS

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NATURE OF THE PROCEEDINGS AND JURISDICTION

This is an appeal from a conviction for Aggravated Robbery, a first degree felony, in violation of Utah Code Ann. § 76-6-302 (1999), in the Third Judicial District Court, State of Utah, the Honorable Ann. M. Boyden, Judge, presiding.[1]

This Court has jurisdiction over this appeal pursuant to Utah Code Ann. § 78-2a-3(2)(j) (Supp. 2002).

STATEMENT OF THE ISSUE, STANDARD OF REVIEW, AND PRESERVATION OF THE ARGUMENT

Issue: Under section 77-29-1 of the Utah Code, charges pending against a prisoner must be dismissed if the prisoner is not tried within 120 days of his written request for disposition. The only exception to this is when there is good cause for the delay. Here,

[1] A copy of the Minutes of the "Sentence, Judgment, Commitment" is attached in Addendum A.

good cause did not support the delay because it was caused by ill-timed State motions and administrative errors. Did the trial court err in failing to dismiss the charge?

Standard of Review: Overall, this Court applies the abuse of discretion standard to a trial court's decision about whether to dismiss charges under the 120-day disposition statute. State v. Coleman, 2001 UT App 281, ¶3, 34 P.3d 790. However, underlying conclusions of law are reviewed for correctness, and underlying findings of fact are reviewed for clear error. Id. at ¶4.

Preservation: This issue was preserved at R. 143-48, 271 [2-3].

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Sixth Amendment to the United States Constitution is relevant to the issue on appeal. The Amendment reads, in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . .

U.S. Const. Amend VI.

Article I, section 12 of the Utah Constitution is relevant to the issue on appeal. The provision reads, in pertinent part:

> In criminal prosecutions the accused shall have the right . . . to have a speedy public trial . . . .

UT Const. art. I, § 12.

Section 77-17-13 of the Utah Code, "Expert Testimony," is relevant to the issue

on appeal. The text of that statute is attached in Addendum B.

Section 77-29-1 of the Utah Code, "Disposition of Pending Charge," is determinative to the issue on appeal. The text of that statute is attached in Addendum C.

STATEMENT OF THE CASE

The chronology of events is critical to the issue, so the proceedings are listed in order as follows:

October 31, 2001	Mr. Houston is taken into custody on several charges, including aggravated robbery. R. 6.
November 29, 2001	Mr. Houston is charged by information with aggravated robbery. R. 3-5.
December 8, 2001	Mr. Houston, while in prison, executes a "Notice and Request for Disposition of Pending Charge(s)" for the charge of aggravated robbery. R. 13.
December 14, 2001	The prison records office receives the "Notice and Request for Disposition of Pending Charge(s)" and forwards it to the Salt Lake City Prosecuting Attorney along with a "Certificate of Inmate Status." R. 13-15.
December 20, 2001	Preliminary hearing is set for January 15, 2002. R. 16.
January 15, 2002	Preliminary hearing begins. After testimony by two witnesses, hearing is continued to the following day. R. 255 [44-46].

January 16, 2002	Prison fails to transport Mr. Houston to the court. Hearing continued to January 24th. Id. at 46-48.
January 24, 2002	Preliminary hearing is completed. Mr. Houston is bound over on the charge of aggravated robbery. Id. at 93-94. Arraignment is set for February 11, 2002. R. 30.
February 11, 2002	Arraignment is continued to allow for appointment of conflict counsel. R. 259.
February 25, 2002	Mr. Houston is arraigned and pleads not guilty. R. 260-61. Jury trial is set for March 13-15, 2002. R. 40, 260.
February 27, 2002	The State files a "Notice of Expert Witness." R. 41-42.
March 11, 2002	Pretrial conference is held and, over defense counsel's objection, trial is postponed until April 24-26. R. 272 [12-15, 20].
April 12, 2002	The 120-day period afforded the State to bring Mr. Houston to trial expires. R. 13-15, 85, 143, 271 [6].
April 18, 2002	The defense counsel files a "Motion to Dismiss for Violation of Interstate Agreement on Detainers" and a supporting memorandum. R. 143-48.
April 22, 2002	A hearing is held on the Motion to Dismiss and the trial court denies the Motion, ruling that the delay of the trial was not unreasonable. R. 271 [7-8].
April 24, 2002	Amended information is filed, and jury trial begins. R. 151, 159.

April 26, 2002	Jury trial concludes. The jury returns a verdict of guilty for aggravated robbery. R. 206.
July 1, 2002	Mr. Houston is sentenced. R. 226-27.
July 9, 2002	Mr. Houston files a timely Notice of Appeal. R. 228-29.

STATEMENT OF THE FACTS

On October 23, 2001 Rafael Duran went to Sociables, a State Street bar, with his friend Al Diaz. R. 256 [105-06]. Mr. Duran had just received rent money from his tenants, and the money was in his wallet. Id. at 107-08. He also had his cell phone with him. Id. at 107.

At the bar, someone borrowed his phone to make a call. Id. at 12. Then the borrower passed the phone around to several of his friends, who also made calls. Id. Two of the borrowers were Mr. Houston and Gabriel Valenzuela. Id. at 136.

During the course of the evening, Mr. Houston and Mr. Valenzuela noticed that Mr. Duran had a lot of money. Id. They met in the bar's bathroom and agreed to rob Mr. Duran. Id. at 137. Unaware of this, Mr. Duran continued watching his cell phone as it passed from user to user. Id. at 123-24. Then someone took his phone outside and didn't return. Id. at 124. That person may have been Mr. Houston.[2] Or, it may have been Mr.

[2] At the preliminary hearing, Mr. Duran could not remember the last person to use his phone. R. 255 [20]. However, at trial, Mr. Duran indicated that Mr. Houston was the last person to use his phone. R. 256 [127].

Valenzuela.[3] Becoming concerned, Mr. Duran went outside. R. 256 [113].

Suddenly, something flew towards his head. R. 255 [10]. After that, he remembers nothing until he woke up in the hospital about two weeks later. Id. at 10-11. When he awoke, he found that he had suffered seven knife injuries[4] and a head injury. R. 257 [210]. Also, he had undergone surgery to relieve the bleeding on his brain. Id. at 216. His wallet and cell phone were gone and have never been located. R. 256 [115]. Mr. Duran himself cannot identify who attacked him, or describe any details of the attack.[5]

However, witnesses provide some pieces of the puzzle. Immediately after the attack, several men came outside and found Mr. Duran lying unconscious. The first people to find him were two unidentified Hispanic men, who found him lying near the door. R. 257 [221]. One came back inside, shouting, "[c]all 911, call 911!" Id. Hearing this, Scott Talbot, an acquaintance of Mr. Duran's, went outside and saw him lying unconscious. Id. Mr. Talbot didn't see any blood at first, and so he gently tapped Mr. Duran's face to wake him up. Id. Mr. Duran did not respond. Id. Then some blood and saliva starting coming out of his mouth and he "didn't look good at all." Id. at 222. Mr.

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[3] Apparently, Mr. Valenzuela originally told an investigator that he was in the bar when Mr. Duran went outside. R. 255 [71]. But at trial, he testified that he was the person who borrowed the cell phone and went out the door with it. R. 256 [137].

[4] The knife injuries include two cuts on his back, three on his upper chest, one on his left forearm, and one on his left arm. R. 257 [210].

[5] R. 256 [114-32]. Mr. Duran did, however, identify Mr. Houston in a photo line-up prepared by police. State's Ex. 23. He testified that Mr. Houston was the last person to use his phone. R. 256 [127].

Talbot immediately pulled out his cell phone and called 911. Id. 222.

About that time, Mr. Talbot saw a dark-colored Ford Ranger truck speeding down the alley towards State Street. R. 257 [222-23]. The truck almost ran over Mr. Duran, but it swerved to miss him. Id. at 223. Mr. Talbot saw two people in the truck, but did not get a good look at them. Id. However, another bar patron, Richard Gates, had a better look. R. 257 [238]. He testified that he had seen the two men run up to the truck, climb in, and speed off down the alley. Id. at 238-44. Mr. Gates said that they both looked Hispanic, and he thought that one of them had blonde hair. Id. at 243-44. But he did not see them well enough to identify them. Id. at 244.

Mr. Diaz came outside and saw Mr. Duran lying on the ground. R. 256 [164]. He also saw Mr. Talbot calling for help. R. 256 [165]. The police and ambulance arrived almost immediately. Id.

The police gathered evidence and witness statements. They spoke with Mr. Diaz and he told them about the men who had borrowed Mr. Duran's cell phone. R. 256 [162, 165]. He described two of these men. One had been wearing baggy levis, a white knit shirt with blue sleeves, and two braids in his hair. R. 256 [163]. Mr. Diaz later identified this man as Mr. Valenzuela. State's ex. 25. The other man was wearing a grey sweatshirt with "Yankees" written across the front. R. 256 [163]. This man was identified as Mr. Houston.[6]

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[6] Mr. Diaz did not chose Mr. Houston from a photo line-up. State's Ex. 26. However, Mr. Diaz testified at trial that he was positive that Mr. Houston was the person in the "Yankees"

The police also spoke with Pablo Acevedo, who had accompanied Mr. Valenzuela and Mr. Houston. R. 258 [420]. He said that he didn't know Mr. Valenzuela and Mr. Houston, and that they had joined his group at Gold's Bar. Id. at 421. From there they had all driven to Sociables. Id. He added that Mr. Valenzuela and Mr. Houston had a red Ford Ranger. Id. at 421-22.

While witnesses were being interviewed, the police noticed some fresh blood drippings leading from the scene down the alleyway behind the businesses. R. 256 [158]. The blood stopped between two vehicles that were parked in the parking lot. Id. 159. There was also a blood smear along the wall in front of these vehicles. Id. 160. The police collected photos and samples of this blood. R. 257 [251-52, 253-59, 287-88]. They also collected Mr. Rafael's clothing and took photographs of his clothing and his wounds. Id. at 262-66.

Later, the police located the green Ford Ranger that the robbers had used to flee the scene.[7] There were spatters of blood inside and outside the truck. The police took samples of this blood. R. 257 [278-83]. They also took photos of the truck. R. 258 [426]. The truck was registered to Mr. Houston. R. 257 [236].

After gathering blood samples from the scene, the victim's clothing, and the truck, the samples were prepared for DNA testing. R. 257 [308-23]. A substantial blood sample

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sweatshirt. R. 256 [163].

[7] Mr. Houston's girlfriend, Stephanie Piep, provided the truck to police. R. 258 [425].

was taken from Mr. Houston to compare with the samples. R. 257 [293-94]. Through DNA testing, police found that Mr. Houston's blood matched that on the steering wheel of his truck, the wall facing the parking lot at Sociables, Mr. Duran's shirt, and Mr. Duran's pants.[8] Also, Mr. Houston had a large open cut between the thumb and forefinger of his right hand. State's Ex. 21.

Mr. Houston and Mr. Valenzuela were charged with the crime. R. 3-5.

Mr. Valenzuela gave the police an interview. He told them that, at Sociables, Mr. Houston had approached him in the bathroom and had said "that a guy out there had lots of money, or had some money." R. 258 [432]. Mr. Valenzuela had asked, "[s]o, what, do you want to jack him?" Id. Mr. Houston had replied, "I'm down for whatever." Id. Mr. Valenzuela said that he then went back out into the bar, but worried that Mr. Houston was too "antsy" and needed to relax. Id. at 433. Soon after, he looked around and did not see Mr. Houston in the bar. Id. He said that he went outside and found Mr. Houston in a physical confrontation with Mr. Duran. Id. at 433-34. Mr. Houston had a knife. Id. at 435. Mr. Valenzuela started towards Mr. Duran, and Mr. Duran said, "[w]hat, you too?" Id. at 434. Then Mr. Valenzuela punched Mr. Duran. Id. At that point, he "looked a little woozy" and fell down. Id. Mr. Valenzuela and Mr. Houston ran to their truck and drove

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[8] These samples were labeled Q1 through Q6. Sample Q1 was taken from the steering wheel of the truck. R. 257 [339]. Q2 was taken from the wall at Sociables. Id. at 340. Q3 was another stain from the wall. Id. at 341. Q4 was taken from Mr. Duran's shirt. Id. Q5 was taken from Mr. Duran's other shirt (he had been wearing two shirts). Id. And, Q6 was taken from Mr. Duran's pants. Id. at 342. DNA profiles were made for each of these samples, and the profiles matched the DNA profile of Mr. Houston's blood. R. 257 [351-52].

away. Id. at 435. Mr. Valenzuela said that, as Mr. Houston drove, a cut on his right hand was spurting blood.[9]

Later, under oath at Mr. Houston's trial, Mr. Valenzuela testified differently. He said that he was the one who had borrowed Mr. Duran's cell phone, R. 256 [136], and that it was he who went outside with the phone. Id. He also testified that Mr. Duran followed him outside, but that Mr. Houston did not join them. Id. Then Mr. Valenzuela started fighting with Mr. Duran. Id. Mr. Valenzuela testified that he had a knife, and he stabbed Mr. Duran and took his money. Id. at 137-38, 150. Then Mr. Houston came out, and he and Mr. Houston got into the Ford Ranger and sped away. Id. at 138. Mr. Valenzuela said that he kept most of the money. Id. at 150-51.

The jury convicted Mr. Houston of aggravated robbery, R. 206, but did not find that the State had proved, beyond a reasonable doubt, that Mr. Houston had used a knife in the crime. R. 205. Mr. Houston was sentenced to five years to life in prison. R. 226-27.

SUMMARY OF THE ARGUMENTS

Mr. Houston's conviction should be reversed because the State didn't bring Mr. Houston to trial within 120 days of his written request for 120-day disposition. And, while delays may be justified by good cause, there was not good cause for any of the

[9] R. 258 [435-36]. Before his trial, Mr. Valenzuela accepted a plea bargain and pled guilty to the charge of second degree felony robbery. R. 256 [148].

delays that in this case. There were three delays.

First, a delay was caused when the prison failed to transport Mr. Houston to the continuation of the preliminary hearing on January 16, 2002. The preliminary hearing had started the day before, but was continued to the next day when time ran short. R. 255 [44]. Then, when court reconvened on the 16th, it was discovered that the prison had refused to transport Mr. Houston. Id. at 46. So, the continuation was rescheduled for January 24th. Id. at 47-50. Although this delay is not the fault of the prosecutor or trial court, the time still counts towards the 120 days because it was an administrative error, and such errors do not toll the 120 days. State v. Heaton, 958 P.2d 911, 915 (Utah 1998).

The second delay was caused by the State's filing of a "Motion for a Joint Trial with Dual Juries." R. 31-39. In the Motion the State asked that Mr. Houston be tried with his co-defendant even though the co-defendant had given a confession that implicated Mr. Houston. R. 31-32. This necessitated the appointment of conflict counsel for either Mr. Houston or his co-defendant, and this caused a 14-day postponement of the arraignment. R. 259. So, the delay is attributable to the State, and so the delay does not toll the 120-day period.

The third delay was also caused by the State. This is because the State wanted to present expert witness testimony at trial, but had neglected to give Mr. Houston the statutorily-required 30-day notice. R. 272 [4]. To mend this, the State asked for a continuance to allow the 30 days to pass. Id. The defense counsel strongly objected

because he wished to preserve Mr. Houston's request for disposition within 120 days. Id. at 7, 12-13. However, the trial court granted the continuance. Id. at 17-18. The trial was then rescheduled for April 24th through the 26th, more than a month from the original March 13th through the 15th dates. Id. at 18-19.

None of these delays is supported by good cause because they were not caused by the defendant or by unforeseen circumstances near the trial date. And, under the case law, these are the only justifications for a late trial. State v. Coleman, 2001 UT App 281, ¶14, 34 P.3d 790. In these circumstances, this case should have been dismissed under the 120-day disposition statute.

ARGUMENT

MR. HOUSTON'S CONVICTION SHOULD BE REVERSED BECAUSE THE STATE DID NOT BRING HIM TO TRIAL WITHIN 120 DAYS OF HIS REQUEST FOR DISPOSITION OF THE CHARGE

The State failed to prosecute Mr. Houston within 120 days after he requested disposition of the charge. In fact, not only did the State fail to prosecute within 120 days, it actually caused two of the three delays which resulted in the late trial. So, the late trial cannot be justified and the trial court should have dismissed the charge against Mr. Houston. This is shown by the law.

The controlling law is the 120-day disposition statute. Utah Code Ann. § 77-29-1

(1999). This statute stems from federal and state constitutional rights to a speedy trial,[10] and is meant to "more precisely define what is meant by speedy trial . . . ." State v. Lindsay, 2000 UT App 379, ¶6, 18 P.3d 504 (citations omitted). More practically, the statute also prevents law enforcers from "holding over the head of a prisoner undisposed of charges against him." Id. (citations omitted). Further, it compels prompt prosecution,[11] and encourages trials "while witnesses are available and their memories are fresh." Lindsay, 2000 UT App 379, ¶6 (citations omitted).

These goals are implicit in the words of the statute. The statute provides that, whenever a prisoner has a pending charge, the prisoner may compel the prosecutor to try him within 120 days by delivering a written request to the warden or other authorized person:

> (1) Whenever a prisoner is serving a term of imprisonment in the state prison, jail or other penal or correctional institution of this state, and there is pending against the prisoner in this state any untried indictment or information, and the prisoner shall deliver to the warden, sheriff or custodial officer in authority, or any appropriate agent of the same, a written demand specifying the nature of the charge and the court wherein it is pending and requesting disposition of the pending charge, he shall be entitled to have the charge brought to trial within 120 days of the date of delivery of written notice.
>
> (2) Any warden, sheriff or custodial officer, upon receipt of the demand described in Subsection (1), shall immediately cause the demand to be forwarded by personal delivery or certified mail, return receipt requested,

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[10] State v. Viles, 702 P.2d 1175, 1176 (Utah 1985); State v. Taylor, 538 P.2d 310, 313 (Utah 1975).

[11] Viles, 702 P.2d at 1176.

> to the appropriate prosecuting attorney and court clerk. The warden, sheriff or custodial officer shall, upon request of the prosecuting attorney so notified, provide the attorney with such information concerning the term of commitment of the demanding prisoner as shall be requested.

Utah Code Ann. § 77-29-1(1) & (2) (1999).

Besides outlining the procedure for making a 120-day disposition request, this statute also makes clear that, once the request is made, the prosecutor has the burden of pushing the case forward to meet the deadline. State v. Coleman, 2001 UT App 281, ¶14, 34 P.3d 790; State v. Petersen, 810 P.2d 421, 424 (Utah 1991). This means that the State may not stand passively by while clerical errors delay the case, or while time simply passes. State v. Heaton, 958 P.2d 911, 915 (Utah 1998). The State must schedule all necessary appearances within the 120-day period, and inform the court that prompt scheduling is necessary because of the 120-day disposition notice. Coleman, 2001 UT App 281, ¶14; Petersen, 810 P.2d 425. The State must also actively avoid delays, and if the delays are necessary, the State must minimize them. Coleman, 2001 UT App 281, ¶14; Petersen, 810 P.2d 425.

Of course, the prosecutor's duty to try the case within 120 days is not absolute. The 120-day disposition statute allows for delays that have good cause. The statute says:

> After written demand is delivered as required in Subsection (1), the prosecuting attorney or the defendant or his counsel, for good cause shown in open court, with the prisoner or his counsel being present, may be granted any reasonable continuance.

Utah Code Ann. § 77-29-1(3) (1999). The question becomes, therefore, whether any

delays are supported by good cause. This has been the principal issue in several appeals under the 120-day disposition statute, and some general guidelines have emerged. Most importantly, it has been determined that a good-cause delay is one that is either: (1) caused by the defendant, or (2) "a relatively short delay caused by unforeseen problems arising immediately prior to trial." Coleman, 2001 UT App 281, ¶14; Petersen, 810 P.2d at 426.

As a practical matter, some good-cause delays have included those caused by defendants' motions,[12] those made to accommodate defense counsels' schedules,[13] and those caused by defendants' requests for continuances. State v. Phathammavong, 860 P.2d 1001, 1004-05 (Utah Ct. App. 1993); State v. Bullock, 699 P.2d 753, 756 (Utah 1985). On the other hand, delays that do not have good cause, and therefore do not justify bringing a defendant to trial after the 120-day period, include those caused by court administrative errors,[14] those caused by a prosecutor's inaction,[15] and those caused by a prosecutor's passive acceptance of delayed scheduling. Coleman, 2001 UT App 281, ¶14.

Once a trial court determines whether a delay is justified by good cause, it must

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[12] State v. Maestas, 815 P.2d 1319, 1322 (Utah Ct. App. 1991).

[13] Coleman, 2001 UT App 281, ¶8.

[14] Heaton, 958 P.2d at 915.

[15] Petersen, 810 P.2d at 426.

determine whether to go to trial or dismiss the case. The statute mandates that cases with unjustifiable delays be dismissed:

> In the event the charge is not brought to trial within 120 days, or within such continuance as has been granted, and defendant or his counsel moves to dismiss the action, the court shall review the proceeding. If the court finds that the failure of the prosecuting attorney to have the matter heard within the time required is not supported by good cause, whether a previous motion for continuance was made or not, the court shall order the matter dismissed with prejudice.

Utah Code Ann. § 77-29-1(4) (1999).

If the trial court tries a case after the 120-day period has elapsed, the issue of whether there was good cause for the delay may be reviewed on appeal. Appellate review of such an issue involves a two-step process. First, it should be determined when the 120-day period commenced and when it expired. Second, if the trial was held outside the 120-day period, it must be determined whether "good cause" excused the delay. Coleman, 2001 UT App 281, ¶6; Heaton, 958 P.2d at 916. If it did not, the conviction must be reversed whether there is a showing of prejudice or not. Petersen, 810 P.2d at 427.

In this case, the first step of the process, determining when the 120-day period commenced and when it ended, is easy. That is because it was undisputed below that the 120-day period began on December 14, 2001, and ended 120 days later on April 12, 2002. R. 85-87, 271 [6], 272 [18]. Further, a review of the record shows that this stipulation is soundly based. The "Notice and Request for Disposition of Pending

Charge[s]" was executed on December 8, 2001, and was stamped "received" by the prison records office on December 14, 2001. R. 13. The 120-day period, therefore, began December 14th because delivery to an authorized agent at the prison triggers the 120-day period.[16] Taking this date, then, and adding 120 days shows that the deadline was April 12, 2001.[17]

However, the trial did not occur until April 24, 2002, twelve days past the 120-day deadline. So, under the second step of the test, it must be determined whether good cause justified the lateness of the trial. Coleman, 2001 UT App 281, ¶6.

There were three separate delays in this case, and none of them were justified by good cause. This will be shown in the three sub-sections below. The first sub-section shows that the first delay, which was caused by the prison's failure to transport Mr. Houston to the continuation of the preliminary hearing, R. 255 [46-47], did not toll the 120-day period. The second sub-section shows that the second delay was caused by the State's poorly-timed Motion for a Joint Trial. R. 31-39. Because State-caused delays are not supported by good cause under the 120-day statute, this delay did not toll the 120-day period. The third sub-section shows that the third delay was caused by the State's failure to give the statutorily-required 30-day notice of expert testimony at trial, R. 272 [5-7],

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[16] Utah Code Ann. § 77-29-1(1) (1999); Coleman, 2001 UT App 281, ¶6 n.7; Heaton, 958 P.2d at 916.

[17] 2001 was not a leap year. See http://javascript.internet.com/calculators/leap-year.html (calculating whether any given year is a leap year).

and so the 120-day period was not tolled during this delay.

In these circumstances, the late trial cannot be justified, and Mr. Houston's conviction should be reversed. Alternatively, this case should be remanded for thorough findings and conclusions regarding the first and second delays in this case, and whether they had good cause.

A. The First Delay was Caused by an Administrative Error and does not Toll the 120-day Period

The first delay, which occurred between January 16th and 24th, was not justified because it was due to the prison's failure to transport Mr. Houston to a hearing, and this was not Mr. Houston's fault.[18] Therefore, the 120-day period was not tolled between the 16th and 24th.

It all began on the first day of the preliminary hearing, which was January 15, 2002. R. 255. The court heard testimony from two witnesses, and then had to leave. The court suggested reconvening at lunchtime. Id. at 44. However, neither the State nor the defense could meet then. Id. The judge then suggested reconvening on January 24th, but the State informed the court that a 120-day disposition request had been received and it wished to reconvene as soon as possible. Id. at 45. So, the continuance was scheduled for

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[18] See Coleman, 2001 UT App 281, ¶6 ("A finding of good cause that will excuse failure of the prosecution to bring a defendant to trial within the time required means (1) delay caused by the defendant – such as asking for a continuance; or (2) a relatively short delay caused by unforeseen problems arising immediately prior to trial.") (quotations omitted).

the following morning, January 16th. Id.

Unfortunately, the prison did not transport Mr. Houston for the continuance. Id. at 46-47. In discussing a new date for the continuance, the court noted that a number of jury trials were coming up, and again suggested reconvening on January 24th. Id. at 47. This time the State readily agreed, and the date was set. Id. at 47-48. On the 24th, the continuance was held and Mr. Houston was bound over. Id. at 50, 93-94.

The delay between the 16th and 24th must be counted towards the 120-day period because it was not a good-cause delay. In other words, it was not a delay caused by Mr. Houston. Further, the delay was not caused by an unforeseen problem arising immediately before trial. Indeed, this delay occurred well before trial and was not even necessarily unforeseen because the prison needs more than one day's notice to transport a prisoner. Id. at 46.

What is more, the Utah Supreme Court has already settled the question of whether administrative errors such as this toll the 120 days. Specifically, they do not. Heaton, 958 P.2d at 915. This is because the 120-day disposition statute places the burden of moving the case forward solely on the prosecutor. Id. This has been emphasized by the case law.

In the Utah Supreme Court case of State v. Heaton, the Court considered the issue of whether a delay caused by a court clerk's neglect in failing to docket the case was supported by good cause. Heaton, 958 P.2d at 915. The Court determined that it was not because the prosecutor has a duty to compel the case forward regardless of such glitches:

> The mere fact that the delay was not caused by the prosecutor has never been considered dispositive because to hold that good cause is supported by the lone fact that the delay was not caused by the prosecutor would contradict the language in section 77-29-1(4) which places the burden of complying with the statute on the prosecution.

Heaton, 958 P.2d at 915. The Court also noted that, while administrative mistakes are regrettable, the prosecutor's office must operate independently of administrative agencies. Id. It must work on its own to push the case forward. Id.

The recent case of State v. Coleman is also on point. In that case, the defendant had made a routine request for a delay of the preliminary hearing. Coleman, 2001 UT App 281, ¶14. A 120-day disposition notice filed by the defendant had not yet been received, and the prosecutor agreed to the delay. Id. Upon review, this Court found that the State did not take its responsibility to move the case forward seriously enough:

> the prosecution, knowing that it had or could soon have an obligation to bring the matter to trial within 120 days, may not passively accept a defendant's delay of the preliminary hearing, and then turn around and claim the delay kept the prosecution from meeting its burden.

Id. So, even when it has not received a 120-day disposition request, the prosecution still has some measure of responsibility to move the case forward.

Other cases, such as State v. Petersen[19] and State v. Taylor[20] have also recognized that the 120-day disposition statute places the burden of moving the case forward on the prosecutor. Administrative glitches or not, the prosecutor must still bring the defendant

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[19] Petersen, 810 P.2d at 426.

[20] Taylor, 538 P.2d at 312-13.

to trial within 120 days. Utah Code Ann. § 77-29-1(4) (1999). It is only those delays caused by the defendant or by unforeseen problems just before trial that toll the 120 days. Coleman, 2001 UT App 281, ¶6. And, the prison's failure to transport Mr. Houston in this case does not fall into either of these categories.

Nobody denies that the prison's failure to transport Mr. Houston was not the prosecutor's fault. However, as explained in Coleman and Heaton, that is not the point. The prosecutor still has the responsibility of moving the case along, and administrative errors do not relieve the prosecutor of this burden. Heaton, 958 P.2d at 915. Therefore, this time counts towards the 120 days and, along with the other delays, shows that Mr. Houston's conviction should be reversed.[21]

B. The Second Delay was Caused by the State's Motion for Joint Trial with Dual Juries, so it is not Justified by Good Cause

The second delay that occurred in this case also does not toll the 120 days because it was a delay caused by the State. The State, on the day of the arraignment, February 11, 2002, filed a motion requesting that Mr. Houston be tried jointly with his co-defendant,

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[21] Notably, the trial court did not make any legal or factual findings regarding this delay. R. 271 [6-8]; 272 [10-14]. However, the record of facts on this point is thorough, R. 255 [44-50], and the determination of whether the prison's failure to transport Mr. Houston constitutes good cause for a delay is a legal determination. See Heaton, 958 P.2d at 915 (whether administrative errors constitute good cause requires an interpretation of 77-29-1(4)). Therefore, this Court may properly reach this question.

However, should this Court determine that more facts are needed, Mr. Houston requests that this case be remanded for further findings and conclusions regarding this delay.

Gabriel Valenzuela. R. 31-39. This necessitated a continuance of the arraignment so that either Mr. Houston or Mr. Valenzuela could be appointed conflict counsel.

The reason conflict counsel was required was that the State's motion had placed Mr. Houston's interests in immediate conflict with Mr. Valenzuela's. Mr. Valenzuela had given the police a confession implicating Mr. Houston, R. 256 [140-48], and such a circumstance presents unique constitutional and evidentiary issues. In such circumstances, each defendant must have uncompromised, independent advice. So, Mr. Houston and Mr. Valenzuela could no longer both be represented by the Salt Lake Legal Defender's Association, as they had to that point.[22]

Notwithstanding, the trial court found that the 120 days were tolled during this period of time. R. 271 [6]. The court did not attribute the delay to either party, but held that, because the appointment of conflict counsel was necessary, the delay was reasonable:

> there was a delay at the arraignment because there needed to be conflict counsel. And again, I don't know that it is necessary that I actually attribute to one side or the other what the delay was, but it is clear that with the two defendants still pending trial that there needed to be a conflict counsel. And that certainly does not unreasonably delay the case.[23]

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[22] State v. Humphrey, 793 P.2d 918, 923 (Utah Ct. App. 1990); State v. Webb, 790 P.2d 65, 72-75 (Utah Ct. App. 1990). Mr. Houston was represented by David P.S. Mack of the Salt Lake Legal Defender's Association, R. 9, and Mr. Valenzuela was represented by Patrick L. Anderson of the Salt Lake Legal Defender's Association. R. 255 [2].

[23] R. 271 [6]. The court made a similar statement in the March 11th hearing wherein the State asked for a continuance. R. 272 [11]. Besides that, there are no other findings to review on this point. The record does contain some Findings of Fact and Conclusions of Law, R. 133-36,

The trial court's ruling is faulty for two reasons. First, the trial court applied the wrong standard in deciding to toll the 120 days. Second, and most importantly, the court did not take into consideration the reason for the immediate need for conflict counsel.[24]

The court's first error, applying the reasonableness standard instead of the "good cause" standard, is demonstrated by the 120-day disposition statute. Under the 120-day disposition statute, continuances may be granted only for "good cause shown in open court . . . ." Utah Code Ann. § 77-29-1(3) (1999). In the next paragraph, the statute again says that a delay cannot be justified without the support of "good cause." Utah Code

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but since they are unsigned, unstamped, and undated, they cannot be considered court-issued. There was some discussion about these findings and conclusions at the April 22nd hearing, but they were never signed and filed. R. 271 [8-9]. Appellate counsel attempted to supplement the record with signed, stamped, and dated findings and conclusions, and this Court issued an order for the supplementation, R. 268, but no such document was added to the record. R. 259-70. Appellate counsel was informed by the third district appellate clerk that this was not found in the record. So, the only findings and conclusions that may be reviewed in this case are those made orally by the trial court at the March 11th and April 22nd hearings. R. 271 [6-9]; 272 [10-18].

[24] The trial court's ruling is reviewed for correctness. See Petersen, 810 P.2d at 424 ("Questions of law are reviewed for correctness.") This is because, as a matter of law, the court applied a reasonableness standard rather than the correct, "good cause" standard which is required by the 120-disposition statute and the interpretive case law. R. 271 [6]; Utah Code Ann. § 77-29-1(3) & (4) (1999); Coleman, 2001 UT App 281, ¶6; Heaton, 958 P.2d at 915. And, while the overall issue in this case is reviewed for abuse of discretion, the trial court does "not have discretion to misapply the law." Coleman, 2001 UT App 281, ¶17 n.11 (quotations omitted).

Further, the court made no findings of fact on this point. So, the clearly erroneous standard is not applied. Of course, the court should have made factual findings because such findings are helpful in determining whether this delay was attributable to Mr. Houston. Id. at ¶6. The record contains enough information, though, to demonstrate that this delay was not caused by Mr. Houston.

Nonetheless, should this Court determine that the record is insufficient, this case should be remanded for findings on this point.

Ann. § 77-29-1(4) (1999). The only time reasonableness is mentioned in the statute is when it indicates that the continuance may be for a "reasonable" length of time. Utah Code Ann. § 77-29-1(3) (1999). But this refers, of course, to the length of the continuance, not the justification for the continuance. Id. So, the "good cause" standard, rather than the "reasonableness" standard, should have been applied.

This is further supported by the case law. This Court and the Utah Supreme Court have repeatedly emphasized that it is the "good cause" standard which applies in cases like this. Without exception, this is the standard which has been used to determine whether a delay tolls the 120-day period, and the standard has never been confused with a reasonableness standard or otherwise diluted.[25] And, as has already been noted, the good-cause standard justifies a delay only if it was caused by the defendant, or by unforseen problems arising just before trial. Coleman, 2001 UT App 281, ¶6; Petersen, 810 P.2d at 426. Other matters are inconsequential unless they are related to these questions in some way.

With this, the trial court's second error becomes apparent. That is, the trial court did not take into account the reason for the immediate need for conflict counsel and the postponement of the arraignment. In fact, the court even said that it didn't find it necessary to attribute this delay to the actions of "one side or the other." R. 271 [6]. This

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[25] Heaton, 958 P.2d at 915; Petersen, 810 P.2d at 425; State v. Peterson, 2002 UT App 53, ¶8, 42 P.3d 1258; Coleman, 2001 UT App 281, ¶6; Pathammavong, 860 P.2d at 1005; Maestas, 815 P.2d at 1321.

was error because the reason for the immediate need for conflict counsel and the postponement of the arraignment was crucial to the determination of whether the delay was justified by good cause. If the delay was caused by Mr. Houston, it was supported by good cause. If it was caused by anyone other than Mr. Houston, the 120-day period should not have been tolled. And, a review of the record shows that this delay was not caused by Mr. Houston.

The record shows that, until the originally-scheduled arraignment on February 11th, Mr. Houston had been prosecuted with his co-defendant, Gabriel Valenzuela.[26] The Information listed them as co-defendants, R. 3, and both were appointed attorneys from the Salt Lake Legal Defender's Association. R. 9, 255 [2]. The preliminary hearing was held jointly, R. 255 [4], and both men were bound over. Id. at 93. The arraignment for both was scheduled for February 11th. R. 259.

However, on February 11th, the State filed a "Motion for Joint Trial with Dual Juries." R. 31-39. This immediately placed the interests of Mr. Houston and Mr. Valenzuela in conflict because Mr. Valenzuela had given a confession which implicated Mr. Houston in this crime. R. 31, 256 [138-148]. In these circumstances, trials are usually held separately. Then, the out-of-court confession is not admitted at the trial of the non-confessing defendant unless the confessor appears in court for cross-

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[26] This joint prosecution was, at that point, permissible under section 77-8a-1 of the Utah Code, which provides that defendants may be charged in the same Information "if they are alleged to have participated in the same act or conduct or in the same criminal episode." Utah Code Ann. § 77-8a-1(2)(b) (1999).

examination. Bruton v. United States, 391 U.S. 123, 135-37 (1968). This is because such confessions are "inevitably suspect" and they cannot be brought to the jury's attention without, at the very least, the opportunity to cross-examine the confessor. Id. at 136. In Utah, in fact, such defendants may not be tried together without an explicit court order allowing the procedure. Utah Code Ann. § 77-8a-1(3)(a) (1999). And so it was not foreseeable that the State would wish to try Mr. Houston and Mr. Valenzuela together, or that it would file the Motion on the day of the arraignment.

After the State filed its Motion for a Joint Trial with Dual Juries, however, an immediate conflict arose between Mr. Houston and his co-defendant. On one hand, Mr. Houston's right to the confrontation of the witnesses against him stood to be compromised by Mr. Valenzuela's out-of-court confession emphasizing that Mr. Houston was the more culpable person in the crime. R. 256 [140-46]. On the other hand, it was in Mr. Valenzuela's interest to admit the confession and possibly obtain a more favorable verdict or sentence.[27] This conflict necessitated the immediate need for the appointment of conflict counsel for either Mr. Houston and Mr. Valenzuela because each needed uncompromised, independent advice on everything from trial strategy, to plea

[27] In fact, Mr. Valenzuela did obtain a more favorable circumstance. He accepted the offer of a second-degree robbery conviction, which was more favorable than the first-degree aggravated robbery charge which he faced. R. 256 [148]; R. 3-4. At trial, he testified that he blamed Mr. Houston for the crime "[t]o get a deal." Id. at 148.

officers, to evidence, and the arraignment.[28] Accordingly, the arraignment was postponed to allow for this.

All of this shows that, even though it was the defense who needed to arrange for conflict counsel,[29] this circumstances was necessitated by the State's unexpected filing of its Motion for a Joint Trial. The State caused this delay. The State could have filed its motion for a joint trial before the arraignment, thereby allowing conflict counsel to be appointed in time for the scheduled arraignment. Or, it could have filed the motion after the arraignment, thereby saving the need for a postponement. Indeed, it should have taken one of these courses because it is responsible for moving the case along. Heaton , 958 P.2d at 915. However, the State filed its motion on the day of the arraignment, and this necessitated a postponement. Days were lost in bringing Mr. Houston to trial, and this delay is not attributable to Mr. Houston.

In sum, the 120-day period should not be tolled between the original arraignment

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[28] See Rule of Prof. Cond. 1.7 (2002) ("(a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless: (1) The lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and (2) Each client consents after consultation. (b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person or by the lawyer's own interest, unless: (1) The lawyer reasonably believes the representation will not be adversely affected; and (2) Each client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation to each client of the implications of the common representation and the advantage and risks involved.")

[29] In some cases a continuance granted to allow for the appointment of conflict counsel tolls the 120 days because it is a delay attributable to the defense. Phathammavong, 860 P.2d at 1004; Maestas, 815 P.2d at 1321. But in this case that is not true; here it was the State which caused this delay.

date of February 11th and the postponement date of February 25th. This delay is not attributable to Mr. Houston was necessitated by the State's arraignment-day filing of a "Motion for a Joint Trial with Dual Juries." R. 31-39. So, this delay, along with the others, shows that the late trial is not justifiable, and Mr. Houston's conviction should be reversed.

Alternatively, Mr. Houston asks that this case be remanded for findings of fact relevant to this delay. The trial court did not make such findings, R. 271 [6], and even though the record contains enough information to demonstrate that this delay was not caused by Mr. Houston, factual findings could more fully demonstrate this. Therefore, if this Court decides not to reverse Mr. Houston's conviction, he asks that this case be remanded for thorough findings.

C. The Third Delay was Caused by the State's Failure to Give the Required Expert-Witness Notice, so it is not Justified by Good Cause

The third delay, which is the one which took the trial past the 120-day deadline, was not justified by good cause. This is because it was not caused by Mr. Houston or by unforeseen circumstances. It was caused by the State's request for a trial postponement from the original dates of March 13th, 14th, and 15th, R. 260, to April 24th, 25th, and 26th. R. 66. So, because State-caused delays are not justifiable, Mr. Houston's conviction must be reversed.

The State asked for the postponement because it failed to give Mr. Houston the

statutorily-required 30-day notice that it intended to call an expert witness at trial. This notice is required by section 77-17-13 of the Utah Code, and indicates that "the party intending to call the expert shall give notice to the opposing party as soon as practicable but not less than 30 days before trial . . . ." Utah Code Ann. § 77-17-13(1)(a) (1999). In this case, the State did not send the notice of expert witnesses until February 27 th, 2002, only fourteen days before the scheduled trial. R. 41-42.

This was brought to the court's attention at the pretrial conference on March 11 th. R. 272 [4-5]. At that conference, the State asked for a continuance to allow for the passage of the 30 days. Id. However, the defense counsel refused to agree, asserting that Mr. Houston would not waive his right to be tried within 120 days. Id. at 12-13. The defense counsel also pointed out that the State had possessed the experts' reports at least from the time of the preliminary hearing,[30] and there had been ample time to notify the defense if it intended to call these witnesses. R. 272 [6-7]. But the State did not do this. Id. In these circumstances, the defense counsel argued, the State should simply forego the experts' testimonies. Id. at 7.

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[30] The experts' reports, at least most of them, had been provided to the defense counsel at the preliminary hearing. Id. at 9. However, providing the reports does not meet the statutory requirements under section 77-17-13 of the Utah Code. This is because the reports themselves do not inform the defense that this information will be presented at trial. The defense must be specifically informed whether they will presented because the defense needs time to "examine the testing procedures used by the experts and compare them with other testing methods, hire [an] expert to challenge the testing procedures, and examine the resumes of the experts and possibly impugn their qualifications." State v. Tolano, 2001 UT App 37, ¶8, 19 P.3d 400. So, merely receiving the reports is inadequate under the statute. Id. at ¶19.

In evaluating these arguments, the court opined that the prosecution had shown diligence by providing the expert notification two days after the arraignment. Id. at 14. So, the court ruled, the experts' testimonies should be allowed. Id. The only question, the court said, was whether the defense would be prepared for the expert witnesses' testimonies by the trial date. Id. at 12. If not, the trial would be postponed to allow for the 30 days, and any resulting delay would be considered reasonable. Id. at 12-14.

The defense counsel disagreed with this view of the situation. He emphasized again that Mr. Houston would not waive the 120-day disposition right or the notification right, Id. at 13, and expressed dismay at being forced to chose between the right to 120-day disposition and the 30-day notice request. Id. at 16.

Nonetheless, the court said the expert testimony would be allowed, and that the defense counsel needed to decide whether he wanted the 30 days to prepare or could simply confront the expert at the already-scheduled trial. Id. at 13-14. The defense counsel, after consultation with his office, said that he was not prepared to confront the expert witnesses. Id. at 16. But he also emphasized that the appropriate remedy here would be either exclusion of the expert witnesses or a continuance within the 120-day period. Id.

The court then ruled that the trial would be postponed to allow for passage of the 30 days required by the expert witness notification statute. Id. at 17-18. The court based this ruling on its finding that the State had not acted in bad faith:

> It is true that I have ruled that I will not exclude the testimony or the expert witnesses based on the noncompliance with the 30 days because I just simply did not find the bad faith necessary in the failure to comply with the 30-day notice. The State has done it as quickly as they can in the trial setting. And so by not excluding the testimony, or excluding the witnesses I guess, by default, I guess that means I am granting the continuance and it is to the requesting party.

Id. at 17. Importantly, however, the court also acknowledged that this delay was attributable to the State. Id. at 17-18. Additionally, because Mr. Houston did not waive the 120-day disposition right, the trial would be rescheduled as soon as possible. Id. at 17.

Unfortunately, the trial was scheduled for April 24th, 25th, and 26th, days past the April 12th deadline.[31] Naturally, the defense counsel filed a Motion to Dismiss, R. 143-48, and a hearing on the Motion was scheduled. At the hearing, the trial court incorrectly used a reasonableness standard in determining that the delay was justified:

> I need to weigh everything and decide what is reasonable and what is not reasonable. And in fact that is why the findings that I need to make are not just whether or not it was one party or the other who made a mistake, or one party or the other who didn't comply. I need to be able to look at all of the circumstances and see whether or not the delay is reasonable.

R. 271 [6]. Then, the trial court summarized its conclusions from the March 11th

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[31] To allow for 30 days between the notice of an expert witness and the trial, the trial could not be scheduled until after March 29th. See R. 41-42 (30 days after the file date of February 27th, 2002 was Friday, March 29th, 2002). The next week, which was the first week of April, was unavailable because the defense counsel was out of town. R. 272 [18]. Then, the following week, the court was on the "mast arraignment calendar" and could not schedule the trial. Id. at 19. Friday of that week was April 12th, the last day of the 120 days. The court also could not schedule trial the week of the 15th because it was on the "master pretrial calendar." Id. at 19. So, the trial was scheduled for the 24th, 25th, and 26th. Id. at 20.

conference, saying that it was not unreasonable to schedule trial beyond the 120-day deadline because the defense counsel had needed to time to prepare for the expert testimony. Id. at 7. Then, the trial court denied the Motion.[32]

The trial court's denial of the Motion was error. This is because, as with its evaluation of the arraignment postponement, the trial court erroneously applied a reasonableness standard, rather than the statutorily-mandated "good cause" standard. R. 271 [7-8]. Secondly, the trial court's interpretation of the requirements under the 30-day expert-notice statute is incorrect. Finally, the trial court ignored options that would have allowed Mr. Houston all of his constitutional rights, rather than requiring him to chose between them.[33]

The first error, which was applying the incorrect reasonableness standard, is particularly damaging. That is because this standard focuses merely on whether a delay is

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[32] R. 271 [8]. As noted in the previous sub-section, the State drafted some findings of fact and conclusions of law on this subject, R. 130-32, but they were not signed or filed. So, they are not included in this discussion.

[33] The trial court's rulings on this delay should be reviewed for correctness because all of the related rulings were interpretations of law. The court's application of a reasonableness standard rather than the correct "good cause" standard was legal error, and the court's interpretation of the requirements under the 30-day expert-notice requirement statute was a legal determination. So, the correctness standard applies. See Heaton, 958 P.2d at 914 ("We review the trial court's legal determinations for correctness."); Coleman, 2001 UT App 281, ¶3 n.3 ("legal determinations concerning the proper interpretation of the statute which grants the trial court discretion are reviewed for correctness."); Petersen, 810 P.2d at 424 ("Questions of law are reviewed for correctness.")

understandable in light of the legal requirements.[34] But that is not the point; many types

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[34] In applying a reasonableness standard, the trial court considered factors relating to whether the delay was understandable in the circumstances. R. 271 [7]. This is shown by, among other things, the court's consideration of whether the prosecutor's filing of the notice was "disingenuous," whether the circumstances in general showed bad faith, and whether Mr. Houston wanted the 30 days to prepare for the expert testimony:

> The expert discovery issue is a little bit more problematic just in that there are some very specific statutory requirements that the State needs to make in order to meet their discovery requirements. They are required to bring in an expert witness. And again, Mr. Burmester apparently has met those requirements as far as giving the explanation and even attempted to give all of the information as quickly as this matter was set, but the matter was not set out 30 days. The first trial date was within 20 days, so we technically could not make that 30-day notice requirement. Now whether he could have provided that information, even before I had set it for trial, is what Mr. Mack is arguing, and because of the fact that this has been presumed that it was going, and it has looked like it was going to trial, the defendant has wanted it to go to trial, and everybody has anticipated that it is going to go to trial, is meaningful argument but I do not think it is reasonable to say that it was not even bound over and any appearance before me and set for any trial date. I am not finding that their failure to comply was disingenuous because they really had to give what information they can and simply did not meet the technical requirement of the 30-day notice because the trial was set sooner than 30 days.
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> They said they gave the information as quick as they could and even then the remedy for that is not to keep out the evidence but the remedy for that is a continuance. And I asked the defendant at that time, given the fact that we had two conflicting issues for a delay, as whether he wanted the time to have that expert testimony information, or if he wanted to stay the 120-day time period. And Mr. Mack talked with his office, discussed it with Mr. Houston, looked into the issues and determined that they did in fact need the time to correlate and adequately prepare.
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> Again, that is not unreasonable, and again, it was not something that I am therefore saying that the delay was on the part of the defendant. I am simply looking at all of the circumstances and finding that under those facts, without stating that the delay was specifically to the defendant, or specifically to the State, that under all of those facts it was reasonable to give everyone time they needed to meet the statutory requirements of expert notice, and that the delay was not unreasonable to reset this trial.

of delays could be understandable. Yet, that does not mean that they justify compromising a defendant's speedy trial rights as they are articulated in the 120-day disposition statute. Constitutionally and statutorily, the prosecutor has the burden of moving a case forward, and this burden is not relieved simply because an understandable delay arises. Utah Code Ann. § 77-29-1(3) & (4) (1999); Heaton, 958 P.2d at 915; Petersen, 810 P.2d at 424.

As has already been shown, it is the "good cause" standard, rather than a reasonableness standard, which applies. The "good cause" standard is mandated in two places in the 120-day disposition statute. Utah Code Ann. § 77-29-1(3) & (4) (1999). Further, this Court and the Utah Supreme Court have consistently applied the "good cause" standard in evaluations of delays.[35] This means that delays are justified only if they are caused by the defendant or unforseen problems arising just before trial. Coleman, 2001 UT App 281, ¶6; Petersen, 810 P.2d at 426.

Applying the good cause standard shows that the postponement of the trial was not justified. This is because the postponement was not caused by Mr. Houston, it was caused by the prosecutor's failure to give 30-day notice that it intended to call expert witnesses at trial. R. 41-42, 271 [7-8], 272 [4-7]. Also, this was not an unforeseen problem. The prosecutor was fully aware that, by statute, 30-day notice of expert

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R. 271 [7-8].

[35] Heaton, 958 P.2d at 915; Petersen, 810 P.2d at 425; Peterson, 2002 UT App 53, ¶8; Coleman, 2001 UT App 281, ¶6; Pathammavong, 860 P.2d at 1005; Maestas, 815 P.2d at 1321.

testimony was required. R. 272 [4-5]; Utah Code Ann. § 77-17-13 (1999). He was also aware that a request for 120-day disposition had been filed. R. 255 [44]. Knowing that he had to meet both time-sensitive requirements, he should have sent the notice quickly and worked to keep the trial within the 120-day period. However, he did not and this caused the postponement of the trial from its original dates of March 13th, 14th, and 15th to April 24th, 25th, and 26th. This was days after the April 12th deadline, and so this case should have been dismissed.

The trial court's conclusion to the contrary is erroneous not only because the court applied the incorrect reasonableness standard, as shown above, but also because of a second error it made in its evaluation. That is, the trial court erroneously interpreted the requirements of the 30-day notification statute and relied upon this interpretation in justifying the delay of the trial. R. 271 [7-8], 272 [10-12, 17-18].

The trial court's interpretation was that the trial postponement was justified because trial was set only twenty days from the arraignment, and the prosecutor showed good faith by sending notice of the expert witnesses only two days after the arraignment, which occurred about a month after the bindover. R. 271 [7-8]. So, the trial court said, delaying the trial to allow the defense its time to prepare for the testimony was reasonable. R. 272 [17-18].

However, this reasoning is unsound. The notification statute does not allow a party to wait until after the arraignment, the trial scheduling, or any other event before

providing notice of the expert witness. Indeed, the statute does not tie the notification to any of these events. The statute merely provides that, in any event, a party intending to call an expert witness must give the opposing party notice at least 30 days before trial, and the notice must include the expert's name, address, resume, and report:

> (1)(a) If the prosecution or the defense intends to call any expert to testify in a felony case at trial or any hearing, excluding a preliminary hearing held pursuant to Rule 7 of the Utah Rules of Criminal Procedure, the party intending to call the expert shall give notice to the opposing party as soon as practicable but not less than 30 days before trial or ten days before the hearing.
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> (b) Notice shall include the name and address of the expert, the expert's curriculum vitae, and a copy of the expert's report.[36]

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[36] Utah Code Ann. § 77-17-13(1) (1999). Subsequent sections outline the procedure once the expert notification is received:

> (2)(a) The expert shall prepare a written report relating to the proposed testimony.
> (b) If the expert has not prepared a report or the report does not adequately inform concerning the substance of the expert's proposed testimony including any opinion and the bases and reasons of that opinion, the party intending to call the expert shall provide to the opposing party a written explanation of the expert's anticipated testimony sufficient to give the opposing party adequate notice to prepare to meet the testimony, followed by a copy of any report prepared by the expert when available.
>
> (3) (a) As soon as practicable after receipt of the expert's report, the party receiving notice shall provide to the other party notice of witnesses whom the party anticipates calling to rebut the expert's testimony, including the name and address of any expert witness and the expert's curriculum vitae. If available, a report of any rebuttal expert shall be provided to the other party.
> (b) If the rebuttal expert has not prepared a report or the report does not adequately inform concerning the substance of the expert's proposed testimony, or in the event the rebuttal witness is not an expert, the party intending to call the rebuttal witness shall provide a written explanation of the witness's anticipated rebuttal testimony sufficient to give the opposing party adequate notice to prepare to meet the testimony, followed by a copy of any report prepared by any rebuttal

Further, giving the opposing counsel a copy of the experts' reports, as the prosecutor did in this case, does not qualify as notice under the statute. Tolano, 2001 UT App 37, ¶19; State v. Arellano, 964 P.2d 1167, 1171-72 (Utah Ct. App. 1998). This is because merely providing the report does not inform the opposing party that the expert will be called. Indeed, several experts, one expert, or no experts may produce reports for a case. However, this does not mean that any experts will testify, and "it is not defendant's duty to anticipate and prepare for all potential, yet undisclosed expert witnesses . . . ." Tolano, 2001 UT App 37, ¶11 (citation omitted). So, only a 30-day notification that an expert will be called, along with the expert's name, address, resume, and report, qualifies under the statute. Utah Code Ann. § 77-17-13(1) (1999).

Here, the prosecutor gave the defense counsel the experts' reports at the preliminary hearing. These reports included Gabriel Bier's blood evidence report and Todd Wrigley's DNA report, which were listed later in the "Notification of Expert Witness."[37] Handing the defense counsel the reports, of course, did not meet the notification requirement because there was no notice stating that the experts would be

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expert when available.

Utah Code Ann. § 77-17-13(2) & (3) (1999).

[37] The "Notice of Expert Witnesses" listed two experts: 1) Todd M. Rigley of the Utah Bureau of Forensic Services, who would testify about the DNA analysis, and 2) J. Gabriel Bier of the Utah Bureau of Forensic Services, who would testify about the blood evidence. R. 41. At the preliminary hearing, the prosecutor said he had given these reports to the defense counsel, and identified the experts by name. R. 272 [9].

called as witnesses, plus the names, addresses, and resumes of the experts were not complete. Utah Code Ann. § 77-17-13(1) (1999); Tolano, 2001 UT App 37, ¶11.

Importantly, however, the fact that the prosecutor handed the defense counsel these reports shows that the prosecutor could have given proper notice as early as the preliminary hearing, which was nearly two months before the original trial dates. R. 272 [4-7]. But he did not. Id.

This is not a case where an unforeseen convergence of dates placed the State in the impossible position of giving up this case either under the 120-day disposition statute, or under the 30-day notification statute. The State knew that both statutes were in play, and it could have, and should have, given notice of the expert witness as soon as possible to avoid going past the 120-day deadline. Indeed, if it is held that this is not required, then the speedy trial rights of the 120-day disposition statute would be crippled. The State could always avoid the 120-day deadline by waiting until just before trial to file a notice of expert witnesses. The defense counsel would then be required to forfeit either speedy trial or due process rights, and this is contrary to the purposes of the 120-day disposition and 30-day notification statutes, as well as basic fairness. This circumstance should not be created.

It is true that the appropriate remedy for failing to give the 30-day notification is a continuance to allow the opposing party time to prepare for the expert testimony:

> (4)(a) If the defendant or the prosecution fails to meet the requirements of this section, the opposing party shall be entitled to a continuance of the trial

> or hearing sufficient to allow preparation to meet the testimony.
> (b) If the court finds that the failure to comply with this section is the result of bad faith on the part of any party or attorney, the court shall impose appropriate sanctions.[38]

However, even though this language mandates a continuance where the 30-day notice requirement is not met by a party, it also "leaves some discretion with the trial court to consider the circumstances . . . ." Tolano, 2001 UT App 37, ¶8. So, if another constitutional right, such as the right to a speedy trial, is involved in the case, the court should use its discretion to seek a solution which protects both rights. As the United States Supreme Court has declared, "we find it intolerable that one constitutional right should have to be surrendered in order to assert another."[39]

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[38] Utah Code Ann. § 77-17-13(4) (1999). The final section of the statute addresses expert testimony at preliminary hearings:

> (5)(a) For purposes of this section, testimony of an expert at a preliminary hearing held pursuant to Rule 7 of the Utah Rules of Criminal Procedure constitutes notice of the expert, the expert's qualifications, and a report of the expert's proposed trial testimony as to the subject matter testified to by the expert at the preliminary hearing.
>
> (b) Upon request, the party who called the expert at the preliminary hearing shall provide the opposing party with a copy of the expert's curriculum vitae as soon as practicable prior to trial or any hearing at which the expert may be called as an expert witness.

Utah Code Ann. § 77-17-13(5) (1999).

[39] Simmons v. United States, 390 U.S. 377, 394 (1968). In Simmons, the criminal defendant motioned to suppress evidence. Id. at 381. In order to establish standing to make the motion, the defendant testified that he was the owner of some of the items of evidence. Id. He lost the motion to suppress, and the prosecutor entered his testimony as evidence at trial. Id. The United States Supreme Court held that this was intolerable because it forced the defendant to chose between his Fourth Amendment rights and the right to be free from self-incrimination.

Nonetheless, this is precisely what the trial court did. The trial court asked Mr. Houston to chose between his speedy trial and due process rights, as they are enunciated in the 120-day disposition and 30-day notification statutes. R. 272 [17-18]. This was inappropriate in these circumstances, particularly in light of the availability of other options that would preserve both Mr. Houston's rights.

The trial court's failure to consider these options was its third evaluative error in the ruling on the trial postponement. These options included either: (1) foregoing the State's expert testimony, or (2) continuing trial after the 30 days pass but before the 120-day deadline. The defense counsel, in objecting to infringement upon either the 120-day speedy trial right or the 30-day expert notification right, outlined both of these options to the trial court.

However, the trial court would not consider foregoing the expert testimony. R. 272 [12-13]. And then the trial court did not even schedule the trial before the 120-day deadline. This was partly because the defense counsel was out of town for the first week after the 30 days had passed, and partly the court was unavailable for the next two weeks. R. 272 [18-19]. Admittedly, delays made in part to accommodate defense counsels' schedules are often considered justified by good cause. Coleman, 2001 UT App 281, ¶11. But here, the fact that the defense counsel was out of town for the first week after the 30-day notification period does not toll the 120 days. This is because the postponement itself was caused by the State's failure to file the required 30-day notice.

R. 41-42; 271 [7-8]; 272 [4-7]. If not for the State's oversight, the postponement would not have been necessary, and the defense counsel's schedule would have been irrelevant. Further, the trial court was more at fault than the defense counsel because it had conflicts for both the second or third weeks in April. R. 272 [18]. So, the period between the originally-scheduled trial dates and the time of trial should be included in the calculation of the 120-day time period.

In sum, the trial court's conclusion that the postponement of the trial was a justifiable delay is error. None of the three delays in this trial, the postponement of the preliminary hearing continuance, the postponement of the arraignment, or the postponement of the trial, met the requirements for tolling the 120-days. So, Mr. Houston's conviction should be reversed.

CONCLUSION

In light of the above, Mr. Houston respectfully requests that this Court reverse his conviction for failure to prosecute within 120 days after the written request for disposition of charges. Alternatively, Mr. Houston requests that this case be remanded for further factual findings and conclusions on the first and second delays that occurred in this case.

SUBMITTED this 28th day of March, 2003.

HEATHER JOHNSON
Attorney for Defendant/Appellant

DAVID P.S. MACK
Attorney for Defendant/Appellant

CERTIFICATE OF DELIVERY

I, HEATHER JOHNSON, hereby certify that I have caused to be hand-delivered eight copies of the foregoing to the Utah Court of Appeals, 450 South State Street, Salt Lake City, Utah 84114-0230, and four copies to the Utah Attorney General's Office, 160 East 300 South, 6th Floor, P.O. Box 140854, Salt Lake City, Utah 84114-0854, this 28th day of March, 2003 .

HEATHER JOHNSON

DELIVERED to the Utah Court of Appeals and the Utah Attorney General's Office as indicated above this _____ day of March, 2003.

ADDENDUM A

THIRD DISTRICT COURT SALT LAKE COURT
SALT LAKE COUNTY, STATE OF UTAH

STATE OF UTAH, Plaintiff,	:	MINUTES SENTENCE, JUDGMENT, COMMITMENT
vs.	:	Case No: 011918410 FS
RICHARD DALE HOUSTON, Defendant.	:	Judge: ANN BOYDEN Date: July 1, 2002

Custody: USP

PRESENT
Clerk: patd
Reporter: SCHULTZ, KATHLEEN
Prosecutor: BURMESTER, BYRON F
Defendant
Defendant's Attorney(s): MACK, DAVID

DEFENDANT INFORMATION
Date of birth: November 8, 1979
Video
Tape Number: VIDEO Tape Count: 93234

CHARGES

1. AGGRAVATED ROBBERY - 1st Degree Felony
Plea: Not Guilty - Disposition: 04/26/2002 Guilty

SENTENCE PRISON

Based on the defendant's conviction of AGGRAVATED ROBBERY a 1st Degree Felony, the defendant is sentenced to an indeterminate term of not less than five years and which may be life in the Utah State Prison.

COMMITMENT is to begin immediately.

To the SALT LAKE County Sheriff: The defendant is remanded to your custody for transportation to the Utah State Prison where the defendant will be confined.

Case No: 011918410
Date: Jul 01, 2002

SENTENCE PRISON CONCURRENT/CONSECUTIVE NOTE

PRISON SENTENCE TO RUN CONSECTIVELY WITH TIME NOW SERVING AT UTAH STATE PRISON,

SENTENCE RECOMMENDATION NOTE

RECOMMEND CREDIT FOR TIME SERVED AT ADC FROM 10-30-01

SENTENCE TRUST NOTE

RESTITUTION TO BE PAID THRU BOARD OF PARDONS OF $50,302.32 JOINT & SEVERAL

Dated this 2 day of July, 2002.

Ann Boyden
ANN BOYDEN
District Court Judge

227

ADDENDUM B

NOTES TO DECISIONS

ANALYSIS

Noon recess.

Excusing of jurors for noon hour after conclusion of arguments of counsel was not a separation after the case was submitted to them. State v. Pacheco, 13 Utah 2d 148, 369 P.2d 494 (1962).

Requirements.

Statute contained two requirements: (1) that jury be kept together in some private and convenient place, and (2) that no one be permitted to speak or communicate with jurors without permission of court State v. Jarrett, 112 Utah 335, 187 P.2d 547 (1947).

Separation.

Not every separation of a juror gave rise to claim of prejudice, since absolute isolation was not reasonably possible. State v. Jarrett, 112 Utah 335, 187 P.2d 547 (1947).

Statute did not prevent jurors from separation for purposes of necessity, such as to visit lavatory, and, while defendant's right to have jury secluded from outside influences while deliberating should be jealously guarded, law must have been construed in keeping with correlative rights of defendant and jurors. State v. Jarrett, 112 Utah 335, 187 P.2d 547 (1947).

Where only separation of jury was for purpose of necessity, under surveillance of bailiff, and there was no communication with any juror, prejudice would not be presumed. State v. Jarrett, 112 Utah 335, 187 P.2d 547 (1947).

Where the separation of a jury was for the purposes of necessity, under surveillance of bailiff, and there was no communication with any juror, prejudice would not be presumed and the burden was on the defendant to establish that he was prejudiced by the alleged separation. State v. Rivenburgh, 11 Utah 2d 95, 355 P.2d 689 (1960), cert. denied, 368 U.S. 922, 82 S. Ct. 246, 7 L. Ed. 2d 137, appeal dismissed, 368 U.S. 144, 82 S. Ct. 247, 7 L. Ed. 2d 188 (1961).

COLLATERAL REFERENCES

Am. Jur. 2d. — 75B Am. Jur. 2d Trial § 1647 et seq.

C.J.S. — 23A C.J.S. Criminal Law § 1362.

A.L.R. — Prejudicial effect, in criminal case, of communications between witnesses and jurors, 9 A.L.R.3d 1275.

Juror's reading of newspaper account of trial in state criminal case during its progress as ground for mistrial, new trial, or reversal, 46 A.L.R.4th 11.

Criminal law: propriety of reassembling jury to amend, correct, clarify, or otherwise change verdict after jury has been discharged, or has reached or sealed its verdict and separated, 14 A.L.R.5th 89.

77-17-12. Defendant on bail appearing for trial may be committed.

When a defendant who has given bail appears for trial, the court may, at any time after his appearance for trial, order him to be committed to the custody of the proper officer to await the judgment or further order of the court.

History: C. 1953, 77-17-12, enacted by L. 1980, ch. 15, § 2.

COLLATERAL REFERENCES

C.J.S. — 8 C.J.S. Bail § 136.

77-17-13. Expert testimony generally — Notice requirements.

(1) (a) If the prosecution or the defense intends to call any expert to testify in a felony case at trial or any hearing, excluding a preliminary hearing

held pursuant to Rule 7 of the Utah Rules of Criminal Procedure, the party intending to call the expert shall give notice to the opposing party as soon as practicable but not less than 30 days before trial or ten days before the hearing.

(b) Notice shall include the name and address of the expert, the expert's curriculum vitae, and a copy of the expert's report.

(2) (a) The expert shall prepare a written report relating to the proposed testimony.

(b) If the expert has not prepared a report or the report does not adequately inform concerning the substance of the expert's proposed testimony including any opinion and the bases and reasons of that opinion, the party intending to call the expert shall provide to the opposing party a written explanation of the expert's anticipated testimony sufficient to give the opposing party adequate notice to prepare to meet the testimony, followed by a copy of any report prepared by the expert when available.

(3) (a) As soon as practicable after receipt of the expert's report, the party receiving notice shall provide to the other party notice of witnesses whom the party anticipates calling to rebut the expert's testimony, including the name and address of any expert witness and the expert's curriculum vitae If available, a report of any rebuttal expert shall be provided to the other party.

(b) If the rebuttal expert has not prepared a report or the report does not adequately inform concerning the substance of the expert's proposed testimony, or in the event the rebuttal witness is not an expert, the party intending to call the rebuttal witness shall provide a written explanation of the witness's anticipated rebuttal testimony sufficient to give the opposing party adequate notice to prepare to meet the testimony, followed by a copy of any report prepared by any rebuttal expert when available

(4) (a) If the defendant or the prosecution fails to meet the requirements of this section, the opposing party shall be entitled to a continuance of the trial or hearing sufficient to allow preparation to meet the testimony.

(b) If the court finds that the failure to comply with this section is the result of bad faith on the part of any party or attorney, the court shall impose appropriate sanctions.

(5) (a) For purposes of this section, testimony of an expert at a preliminary hearing held pursuant to Rule 7 of the Utah Rules of Criminal Procedure constitutes notice of the expert, the expert's qualifications, and a report of the expert's proposed trial testimony as to the subject matter testified to by the expert at the preliminary hearing.

(b) Upon request, the party who called the expert at the preliminary hearing shall provide the opposing party with a copy of the expert's curriculum vitae as soon as practicable prior to trial or any hearing at which the expert may be called as an expert witness.

History: C. 1953, 77-17-13, enacted by L. 1994, ch. 139, § 3; 1999, ch. 43, § 1.

Amendment Notes. — The 1999 amendment, effective May 3, 1999, inserted "held pursuant to Rule 7 of the Utah Rules of Criminal Procedure" in Subsection (1)(a), divided Subsections (1) to (4), adding (a) and (b) designations, made two stylistic changes in Subsection (3)(a), and added Subsection (5)

NOTES TO DECISIONS

ANALYSIS

Effect of noncompliance.

The trial court abused its discretion in denying defendant's motion for a continuance based on the state's failure to comply with the expert witness notice requirement of this section. State v. Arellano, 964 P.2d 1167 (Utah Ct. App. 1998).

Expert's report.

In a prosecution for sexual abuse, where the state failed to provide defendant with an expert's report until the afternoon of the first day of the trial, the trial court erred in denying a continuance and allowing the expert's testimony. State v. Begishe, 937 P.2d 527 (Utah Ct. App. 1997).

Failure to provide notice.

—Harmless error.

Although the state failed to disclose an expert witness to the defendant at least 30 days before trial as required by this section, the error was harmless where the expert's testimony was merely cumulative of other properly entered and unchallenged testimony and the outcome of the trial would not have been different had the expert not testified. State v. Bredehoft, 966 P.2d 285 (Utah Ct. App. 1998).

CHAPTER 18

THE JUDGMENT

ADDENDUM C

CHAPTER 29
DISPOSITION OF DETAINERS AGAINST PRISONERS

77-29-1. Prisoner's demand for disposition of pending charge — Duties of custodial officer — Continuance may be granted — Dismissal of charge for failure to bring to trial.

(1) Whenever a prisoner is serving a term of imprisonment in the state prison, jail or other penal or correctional institution of this state, and there is pending against the prisoner in this state any untried indictment or information, and the prisoner shall deliver to the warden, sheriff or custodial officer in authority, or any appropriate agent of the same, a written demand specifying the nature of the charge and the court wherein it is pending and requesting disposition of the pending charge, he shall be entitled to have the charge brought to trial within 120 days of the date of delivery of written notice.

(2) Any warden, sheriff or custodial officer, upon receipt of the demand described in Subsection (1), shall immediately cause the demand to be forwarded by personal delivery or certified mail, return receipt requested, to the appropriate prosecuting attorney and court clerk. The warden, sheriff or custodial officer shall, upon request of the prosecuting attorney so notified, provide the attorney with such information concerning the term of commitment of the demanding prisoner as shall be requested.

(3) After written demand is delivered as required in Subsection (1), the prosecuting attorney or the defendant or his counsel, for good cause shown in open court, with the prisoner or his counsel being present, may be granted any reasonable continuance.

(4) In the event the charge is not brought to trial within 120 days, or within such continuance as has been granted, and defendant or his counsel moves to dismiss the action, the court shall review the proceeding. If the court finds that the failure of the prosecuting attorney to have the matter heard within the time required is not supported by good cause, whether a previous motion for continuance was made or not, the court shall order the matter dismissed with prejudice.